

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ANDRE BROWN,

Plaintiff,

v.

UNKNOWN MACKAY, et al.,

Defendants.

CASE No. 1:18-CV-943

HON. ROBERT J. JONKER

**ORDER APPROVING AND ADOPTING
REPORT AND RECOMMENDATION**

The Court has reviewed Magistrate Judge Carmody's Report and Recommendation in this matter (ECF No. 24) and Plaintiff's Objection to it. (ECF No. 25). Under the Federal Rules of Civil Procedure, where, as here, a party has objected to portions of a Report and Recommendation, "[t]he district judge . . . as a duty to reject the magistrate judge's recommendation unless, on de novo reconsideration, he or she finds it justified." 12 WRIGHT, MILLER & MARCUS, FEDERAL PRACTICE AND PROCEDURE § 3070.2, at 451 (3d ed. 2014). Specifically, the Rules provide that:

The district judge must determine de novo any part of the magistrate judge's disposition that has been properly objected to. The district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions.

FED R. CIV. P. 72(b)(3). De novo review in these circumstances requires at least a review of the evidence before the Magistrate Judge. *Hill v. Duriron Co.*, 656 F.2d 1208, 1215 (6th Cir. 1981). The Court has reviewed de novo the claims and evidence presented to the Magistrate Judge; the Report and Recommendation itself; and Plaintiff's Objection. After its review, the Court finds

that Magistrate Judge Carmody's Report and Recommendation is factually sound and legally correct.

Plaintiff's Objection contains nothing that undermines the validity of the Report and Recommendation, and he fails to deal in a meaningful way with the Magistrate Judge's analysis that Defendant is entitled to summary judgment because the sole remaining claim in this case is unexhausted. Plaintiff concedes that he was required to exhaust his administrative remedies and apparently believes he did so through the grievance process. (ECF No. 25, PageID.155). As the Magistrate Judge properly concluded, however, the record is to the contrary. Plaintiff failed to properly exhaust a retaliation claim because he failed to assert the claim during the initial misconduct hearing. *Siggers v. Campbell*, 652 F.3d 681 (6th Cir. 2011). The Court agrees with the Magistrate Judge's conclusion that Defendant is entitled to summary judgment and Plaintiff is not, for the very reasons the Report and Recommendation delineates.

Finally, the Court notes that while Plaintiff timely filed his Objection, before the Court could act on the Objection, indeed on the same day he filed the Objection, Plaintiff filed a "Notice of Interlocutory Appeal" wherein Plaintiff stated that he "appeals to the United States Court of Appeals for the Sixth Circuit from the order denying summary Judgment in Plaintiff's civil suit on April 9, 2019." (ECF No. 26).

Typically, the filing of a notice of appeal divests a district court of jurisdiction and transfers jurisdiction to the court of appeals. *Cochran v. Birkel*, 651 F.2d 1219, 1221 (6th Cir. 1981). An exception to this rule exists, however, when a party files a notice of appeal from a nonappealable order. *Id.* at 1222. The Sixth Circuit Court of Appeals has determined that such a filing does not divest the district court of jurisdiction to proceed. *Id.* Contrary to Plaintiff's

apparent belief, no final order denying Plaintiff's motion for summary judgment entered on April 9, 2019, or on any other date. The only filing on April 9, 2019, was the Magistrate Judge's Report and Recommendation. Plainly, a Report and Recommendation, which is a non-final order of the Magistrate Judge, is a nonappealable order. Accordingly, the Court does not lack jurisdiction to consider Plaintiff's Objection.

CONCLUSION

ACCORDINGLY, IT IS ORDERED that the Report and Recommendation of the Magistrate Judge (ECF No. 24) is approved and adopted as the Opinion of the Court.

IT IS FURTHER ORDERED that Defendant's Motion for Summary Judgment (ECF No. 20) is **GRANTED**.

IT IS FURTHER ORDERED that Plaintiff's Motion for Summary Judgment (ECF No. 17) and Amended Motion for Summary Judgment (ECF No. 23) are **DENIED**.

The Court discerns no good-faith basis for appeal of this matter. *See McGore v. Wigglesworth*, 114 F.3d 601, 611 (6th Cir. 1997); 28 U.S.C. § 1915(a)(3).

This case is **DISMISSED**.

Dated: April 24, 2019

/s/ Robert J. Jonker
ROBERT J. JONKER
CHIEF UNITED STATES DISTRICT JUDGE